

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 174 of 2019

STATE

V

VILIAME ROKOTABUIVALU DELANA

Counsel : Ms. R. Uce for the State.
: Ms. S. Veitokiyaki for the Accused.

Date of Submissions : 23 June, 2022
Date of Sentence : 23 June, 2022

SENTENCE

1. The accused is charged with the following offences as per the amended information filed by the Director of Public Prosecutions dated 9th May, 2022:

FIRST COUNT

Statement of Offence

MANSLAUGHTER: Contrary to section 239 of the Crimes Act 2009.

Particulars of Offence

VILIAME ROKOTABUIVALU DELANA on the 9th day of October, 2019 at Nadi in the Western Division, being the driver of motor vehicle registration number KD 477 drove the said vehicle in a manner which was reckless as to a risk that his conduct would cause serious harm to **JOSONI BA**.

SECOND COUNT
Statement of Offence

FAILURE TO COMPLY WITH REQUIREMENTS FOLLOWING AN ACCIDENT: Contrary to regulation 63(1) and 87 of the Land Transport (Traffic) Regulation 2000.

Particulars of Offence

VILIAME ROKOTABUIVALU DELANA on the 9th day of October, 2019 at Nadi in the Western Division, being the driver of motor vehicle registration number KD 477 was involved in an accident on Queens Road, Namaka resulting in the death of a pedestrian and injuries to the passenger of the said vehicle, failed to stop and give necessary assistance and information immediately after the accident.

THIRD COUNT
Statement of Offence

USING MOTOR VEHICLE CONTRARY TO LICENSE CONDITION:
Contrary to section 53 (1) (a), 5 and 114 of the Land Transport Act 1998.

Particulars of Offence

VILIAME ROKOTABUIVALU DELANA on the 9th day of October, 2019 at Nadi in the Western Division, drove a vehicle registration number KD 477 on Queens Road, Namaka for the purpose other than specified in the license issued in respect of the class of registration by using that said vehicle as a taxi.

FOURTH COUNT
Statement of Offence

UNLAWFUL POSSESSION OF AN ILLICIT DRUGS: Contrary to section 5 (a) of the Illicit Drugs Control Act 2004.

Particulars of Offence

VILIAME ROKOTABUIVALU DELANA on the 9th day of October, 2019 at Nadi in the Western Division, without lawful authority had in his possession 2.7 grams of Cannabis Sativa or Indian hemp an illicit drug.

2. On 20th August, 2020, after numerous adjournments for one reason or the other the accused pleaded guilty to counts 1 to 3 and not guilty to count 4 when his plea was taken. It is also noted that during this period there was a delay by the state counsel in the filing of the information and the accused had changed counsel.
3. On 27th August, 2020 Mr. Maopa appeared for the accused and made an application for the guilty plea to be vacated which was granted. The matter was adjourned to 8th October, 2020 for Pre Trial Conference. However, it was on 9th December, 2021 the Pre Trial Conference was finally conducted and the matter was adjourned to 9th May, 2022 for trial proper.
4. On 9th May the accused informed the court through his counsel that he wished to plead guilty to counts one and two only. When the first count was read it was noted that the name of the deceased was not correct. The matter was adjourned to the next day 10th for the amended information to be filed and be put to the accused. On this date plea was taken again and the accused pleaded guilty to counts one and two only in the presence of his counsel.

5. On 16th May, the accused admitted the summary of facts read by the state counsel. The brief summary of facts is as follows:
6. On 9th October, 2019 at about 10.50pm, Navakash Chand was at the junction of Kartaram Road waiting for a transport to go to Namaka, Nadi. Whilst waiting, Navakash saw the accused driving his motor vehicle registration number KD 477. Navakash knows the accused as “Bill”.
7. The accused offered to drop Navakash to Navo, Nadi. Navakash then boarded the accused’s vehicle and sat in the front passenger’s seat. The accused then drove his vehicle around the car park to the main road where he picked up another passenger who boarded the vehicle and sat at the rear passenger’s seat.
8. The accused drove the vehicle towards the Votualevu roundabout upon reaching Beverly Hill junction, a vehicle registration number JT 770 driven by Sailosi Naqau overtook the accused’s vehicle. When the accused reached near Low Cost Housing junction, he drove in a dangerous manner by overtaking at a double lane and almost collided with Sailosi’s vehicle at the Tanoa Hotel junction.
9. The two vehicles reached Votualevu roundabout and drove towards Namaka. Sailosi was in the inner lane whilst the accused was in the outer lane. As they were driving through Namaka, the accused drove past Sailosi’s vehicle and continued driving at a high speed.
10. As they approached the Nataly traffic lights, Sailosi noticed the deceased standing on the island of traffic lights in the centre of the road. Sailosi stopped his vehicle as the light changed to amber.
11. Narain Swammy Naicker was in his vehicle registration number IS 858 with Ranjini Lata. They were parked at the junction of Nataly Road on the

left and were waiting for the traffic light to turn green for them to turn left to the main road.

12. When the traffic lights turned green, they looked to the island on the main road and saw the deceased crossing so they waited for the deceased to cross over to the other side before turning left. As they were waiting, the accused drove his vehicle and bumped the deceased.
13. Due to the reckless manner of driving by the accused, upon impact the deceased was thrown about 68.7 meters from the point of impact to the end of the bus stop.
14. The accused did not stop at the accident scene but drove straight to the Tanoa Sky Lodge Hotel. The accused and the other Itaukei man got off from the vehicle and ran away.
15. Timoci Koroqica was driving his taxi picking and dropping off customers at the material time. He was on his way to Namaka when he saw the accused and Sailosi's vehicle racing through Namaka. He saw the accused's vehicle bump the deceased and later saw the accused's vehicle abandoned at the Sky Lodge Hotel. He was able to identify the registration number of both vehicles and knows the accused.
16. Sainimili Bulatale a Medical Officer was at Nataly doing her shopping when she heard a sound coming from the road. Sainimili ran to the scene to see whether or not the pedestrian was still alive. There was no sign of breathing so she checked the carotid and radial pulse and there was none. Sainimili then pronounced the pedestrian dead on the spot.
17. The matter was reported to the police and an investigation was carried out. The deceased's body was conveyed to the Lautoka Morgue. A post mortem examination was conducted on the 11th of October, 2019 at the Lautoka

Hospital by Avikali Mate, the Government pathologist. The cause of death of the deceased was intracranial hemorrhage and traumatic brain injury and severe traumatic head injury. The Post Mortem Report of Josoni Ba was marked as annexure PE1 and the photographs of the post mortem examination as PE2.

18. The rough sketch plan and the fair sketch plan of the scene were marked as annexure PE 3. The photographs of the scene examination dated 13th October, 2019 were marked as annexure PE4.
19. On 11th October, 2019 the vehicle driven by the accused KD 477 was examined by the LTA vehicle examiner who rendered a report on the same date. His remarks were that there were no mechanical defects which could have contributed to the accident. The Vehicle Accident Report was marked as annexure PE 5.
20. The accused was arrested, caution interviewed and charged.
21. After considering the summary of facts read by the state counsel which was admitted by the accused and upon reading the annexures, this court was satisfied that the accused had entered an unequivocal plea of guilty in respect of counts one and two on his freewill. This court was also satisfied that the accused has fully understood the nature of the charges and the consequences of pleading guilty. The summary of facts admitted by the accused also satisfied all the elements of the offences of manslaughter and failure to comply with requirements following an accident.
22. In view of the above, this court found the accused person guilty as charged and he was convicted for counts one and two.

23. Both counsel filed written sentence and mitigation submissions for which this court is grateful.
24. The counsel for the accused presented the following mitigation and personal details about the accused:
 - (a) The accused is 24 years of age;
 - (b) Married with a 6 months old child;
 - (c) Is an active church member;
 - (d) Resides with his aunt, siblings and other family members;
 - (e) Is the sole breadwinner of his family;
 - (f) Is a Motor Mechanic by profession;
 - (g) Earned about \$50.00 to \$100.00 per week;
 - (h) Has had to live with the guilt of his wrong doing, regrets what he has done;
 - (i) Pleaded guilty and saved the court's time;
 - (j) Promises not to reoffend.

TARIFF

25. The maximum penalty for the offence of manslaughter is 25 years imprisonment. The accepted sentencing regime for the offence of manslaughter is a sentence between 5 years to 12 years imprisonment, depending on the circumstances of the offending with the powers of a suspended sentence available to the sentencing court under section 26 (2) (a) of the Sentencing and Penalties Act (*see Samuela Vakaruru vs. The*

State, criminal appeal no. AAU 094 of 2014 (17 August, 2018). At the present time there is no tariff for homicide by motor vehicle.

26. The maximum penalty for the offence of failure to comply with requirements following an accident is \$200.00 fine in default 30 days imprisonment.

AGGRAVATING FACTORS

27. The following aggravating factors are obvious:

- a) Total disregard to the safety of the deceased

The accused did not consider the safety of the deceased who was crossing the road in full view of the accused. The victim failed to exercise due care and vigilance expected of a prudent driver.

- b) Victim was vulnerable

The victim was vulnerable and unsuspecting.

28. Section 17 of the Sentencing and Penalties Act states:

“If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them.”

29. I am satisfied that the two offences for which the accused stands convicted are offences founded on the same facts. Therefore taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence of imprisonment for the two offences.
30. Bearing in mind the objective seriousness of the offences committed I select 5 years imprisonment (lower range of the tariff) as the starting point of the offences. For the aggravating factors, I increase the sentence by 3 years. The interim sentence is 8 years imprisonment.
31. The accused is a young offender (21 years at the time). Even though he has two previous convictions they are unrelated to the current offending hence I consider him as a first offender hence he receives a discount for good character (character references taken into account) and other mitigating factors. The sentence is now 7 years imprisonment.
32. The accused pleaded guilty after more than 2 years of the incidents on the day of the trial proper. In *Gordon Aitcheson vs. The State, criminal petition no. CAV 0012 of 2018 (2 November, 2018)* the Supreme Court offered the following guidance at paragraphs 14 and 15 in regards to the weight of a guilty plea as follows:
33. [14]. In ***Rainima -v- The State*** [2015] FJCA 17; AAU 22 of 2012 (27 February 2015) Madigan JA observed:
- “Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the “high water mark” of discount is one third for a plea willingly made at the earliest opportunity. This court now adopts*

that principle to be valid and to be applied in all future proceeding at first instance.”

*In **Mataunitoga -v- The State** [2015] FJCA 70; AAU125 of 2013 (28th May 2015) Goundar JA adopted a similar but more flexible approach to this issue:*

“In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and qualification to the guilty plea (as a matter of practice and not principle) and assess the effect of the plea on the accused by taking into account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment.”

*[15]. The principle in **Rainima** must be considered with more flexibility as **Mataunitoga** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.*

34. This court accepts that genuine remorse leading to a guilty plea is a substantive mitigating factor in favour of an accused, however, the guilty plea must be entered in the true spirit of remorse since genuine remorse can reduce the harshness in the final sentence (*see Manoj Khera v The State, CAV 0003 of 2016 (1 April, 2016)*).
35. This court does not believe that the accused has shown genuine remorse when he pleaded guilty. The date of allegation is October, 2019 and the accused changed his plea to guilty on counts one and two in May, 2022.

36. Genuine remorse is about genuinely feeling sorry for what a person has done, accepting guilt because of strong evidence and proof of the offender's deeds and then pleading guilty is not genuine remorse *per se*. In this regard, the sentencing court has a responsibility to assess the guilty plea along with other pertinent factors such as the timing of the plea, the strength of the prosecution case etc. Here there is no doubt the timing of the guilty plea is late and that prosecution had a strong case against the accused.
37. Nevertheless, by pleading guilty the accused saved the court's time and expenses. Bearing this in mind, the accused ought to receive some reduction for his guilty plea. The sentence is further reduced, the interim sentence is now 6 years and 6 months imprisonment.
38. From the court file it is noted that the accused has been in remand for 2 months and 18 days. In accordance with section 24 of the Sentencing and Penalties Act I deduct 3 months as a period of imprisonment already served. The final sentence is 6 years and 3 months imprisonment with a fine in the sum of \$150.00 payable in 60 days from today in default 30 days imprisonment.
39. Counsel for the accused has urged this court to consider a suspended sentence unfortunately, considering the circumstances and the seriousness of the offence committed, including the culpability of the accused a suspended sentence will not meet the ends of justice. In respect of the second count the accused through his counsel stated in his mitigation submissions that he was in shock and thus he could not make a proper and sound decision whether to help the victim or run away. The accused accepts that by running away he committed a moral wrong.

40. Having considered section 4(1) of the Sentencing and Penalties Act and the serious nature of the offences committed compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
41. Under section 18 (1) of the Sentencing and Penalties Act (as amended), I impose 5 years and 3 months as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused and also meet the expectations of the community which is just in all the circumstances of this case.
42. Mr. Delana you cannot be forgiven for what you have done your reckless driving has resulted in the loss of an innocent life, a family has lost a dear member because of you.
43. This court will be failing in its duty if a custodial sentence is not imposed. As a responsible driver you did not stop to render any assistance to the deceased which you are legally obliged to under the law but instead left the scene. This tragedy would have been avoided had you exercised restraint and common sense. No amount of regret or repentance will bring back the victim.
44. In summary the accused is imposed an aggregate sentence of 6 years and 3 months with a fine in the sum of \$150.00 payable in 60 days from today in default 30 days imprisonment for one count of manslaughter and one count of failure to comply with requirements following an accident with a non-parole period of 5 years and 3 months to be served before the accused is eligible for parole.

45. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka

23 June, 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Babu Singh & Associates, Nadi for the Accused.